IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 13TH SEPTEMBER 2007 / 22ND BHADRA 1929

SA.No. 382 of 1994(D)

AS.82/1991 of DISTRICT COURT, THODUPUZHA
OS.614/1986 of MUNSIFF COURT, IDUKKI
.....

2nd APPELLANT/ RESPONDENT/PLAINTIFF

ABRAHAM, S/O.VARKEY,
PARAPPALLIKUNNEL,
KUTTIKKAYAM KARA,
MLAPPARA VILLAGE, PEERUMADE TALUK.

BY ADV. SRI.MATHEW SEBASTIAN

RESPONDENTS: APPELLANTS/DEFENDANTS
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1. CHANDY ALIAS THANKACHAN,
S/O. JOSEPH, RESIDING AT
MUTHALAKUZHIYIL, KUTTIKKAYAM KARA,
MLAPPARA VILLAGE, PEERUMADE TALUK.

2. JOLLY, W/O. CHANDY -DO- -DO-

BY ADV. SRI.K.K.CHANDRAN PILLAI
SRI. FRANCIS MATHEW

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 13/09/2007, ALONG WITH SA NO. 385 OF 1994 THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR, J.

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S.A.Nos. 382 and 385 OF 1994

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DATED THIS THE 13th DAY OF SEPTEMBER, 2007

JUDGMENT

Appellant is the plaintiff in O.S.614 of 1986 on the file of Munsiff Court, Idukki. Respondents are defendants. O.S.614 of 1986 was filed by appellant originally for permanent prohibitory injunction which was subsequently got amended for declaration of title, fixation of boundary and for recovery of possession with mesne profits. First respondent in turn filed O.S.183 of 1986 seeking a decree for permanent prohibitory injunction impleading appellant as first defendant and his wife as second defendant. Both suits were originally filed before Munsiff Court, Thodupuzha as O.S.272 of 1984 and O.S.294 of 1984 and were subsequently transferred to Munsiff Court, Idukki and tried jointly. Originally as per judgment dated 28.10.1988, O.S.614 of 1996 was dismissed and O.S.183 of 1986 was decreed. When it was challenged before the District Court, the decrees and judgments were set aside and both the suits were remanded. Thereafter as per common judgment dated 4.7.1991, learned Munsiff found that appellant has title to plaint schedule property in O.S.614 of 1986 and a portion of that property is in the

possession of respondents and plaint schedule property in O.S.183 of 1986 includes that portion of the property also. In O.S.183 of 1986, learned Munsiff found that first respondent is only entitled to be in possession of the property excluding that portion of the property belonging to the appellant. Relying on Ext.C1(b) plan, learned Munsiff found that the demarcating boundary between the property of appellant and respondent is AFED line and plot BCEF belongs to appellant. Finding that to prevent further encroachment into one anothers property, learned Munsiff fixed it as the boundary as marked in Ext.C1(b) plan. Appellant was granted a decree for recovery of possession of plot BCEF. A decree for injunction was granted in O.S.183 of 1986 with regard to remaining plot AEFD. A decree was granted in O.S.614 of 1986 in respect of plot BCEF. First respondent did not file an appeal challenging the decree in O.S.183 of 1986. A.S.82 of 1991 was filed challenging the decree and judgment in O.S.614 of 1986. Appellant on his part, filed A.S.88 of 1991 challenging the refusal of the trial court to grant mesne profits in O.S.614 of 1986. Learned District Judge heard both the appeals together and dismissed A.S.88 of 1991 and allowed A.S.82 of 1991, modifying the decree in O.S.614 of 1986 and fixing line CB in Ext.C1(b) as the boundary separating the property of

appellant and first respondent. As a result plot BCEF forms part of the property of first respondent and not the property of appellant. S.A.382 of 1994 and S.A.385 of 1994 were filed respectively challenging the judgments in A.S.82 of 1991 and A.S.88 of 1991.

2. Second appeals were admitted formulating the following substantial questions of law.

1)Whether first appellate court was right in disturbing the findings in issue No.1 in O.S.614 of 1986 and O.S.183 of 1986, when the finding in O.S.183 of 1986 whereunder the boundary line between the properties of appellant and respondent was fixed as AFED line became final as no appeal is filed against the decree in O.S.183 of 1986.

2) When the decree and judgment in O.S.183 of 1986 has become final and conclusive will it is not operate as resjudicata against the contentions raised in A.S.82 of 1991.

3. Learned counsel appearing for the appellant and respondents were heard.

4. Learned counsel appearing for appellant relying on the Full Bench decision of this court in **Janardhanan Pillai V. Kochunarayani Amma** (1976 KLT 279), and the decision of Apex Court in **Premier Tyres Ltd V. Kerala State Road**

Transport Corporation (1993(2) KLT 130 SC) argued that when no appeal is filed against the decree and judgment in O.S.183 of 1986, findings against respondents who are the plaintiffs in O.S.183 of 1986 will operate as resjudicata and therefore first appellate court should have dismissed the appeal filed by the respondents on that sole ground and the decree and judgment passed by the first appellate court are to be set aside.

5. Learned counsel appearing for respondents argued that O.S.183 of 1986 is only a suit for permanent prohibitory injunction and the boundaries were fixed in O.S.614 of 1986 as there was a prayer in that suit and the issues framed in O.S.183 of 1986 are only with regard to possession and entitlement of first respondent for a decree for injunction and therefore non-filing of an appeal against O.S.183 of 1986 will not operate as resjudicata, in challenging the decree or setting aside the decree in O.S.614 of 1986 and therefore on that ground judgment of the first appellate court cannot be interfered. Relying on the decision of a learned Single Judge of this court in **Mohammed Lebba Mythen Kannu V. Viyathummal Pathummal Beevi** (1989(1) KLJ 84), learned counsel argued that when the plea of resjudicata was not raised before the first appellate court, appellant is precluded from raising that plea and

therefore non-filing of an appeal against the decree in O.S.183 of 1986, is not fatal.

6. The effect of non filing of an appeal against the decree and judgment in one of the suits disposed by a common judgment, in an appeal filed against the decree in the other suit is no more res integra, in view of the Full Bench decision of this court in Janardhanan Pillai's case (supra) and the decision of the Apex Court in Premier Tyres Ltd's case (supra). When there are two suits and the decision is given simulataneously, the observations in that suit cannot be a bar in challenging the judgment in the other suit. But when it is by a common judgment, the non filing of an appeal against the findings in one of the decree would operate as resjudicata, in challenging the judgment in the other suit.

7. The Full Bench on that question held:-

> “There is no provision in the Code of Civil Procedure for consolidating suits. Nevertheless courts order joint trial of two or more suits for the sake of convenience, and, quite often, to avoid conflicting decisions. This is done by the court in the interests of jutice in

exercise of the inherent powers possessed by it. O.XX R.1 of the Code of Civil Procedure requires that after the case has been heard the court shall state its finding or decision, with the reasons therefor, upon each separate issue, unless the finding upon any one or more of the issues is sufficient for the decision of the suit. R.6 deals with the contents of the decree which shall agree with the judgment. It shall contain the number of the suit, the names and descriptions of the parties and particulars of the claim and shall specify clearly the relief granted or other determination of the suit. R.7 provides that the decree shall bear date, the day on which the judgment was pronounced and, when the judge has satisfied himself that the decree has been drawn up in accordance with the judgment, he shall sign the decree.

S.33 of the Code of Civil Procedure obliges the court after the case has been heard to pronounce judgment and on such judgment a decree shall follow. What is executable is only a decree and the fruits of the litigation is realised by the litigant by executing such decree. S.96 of the Code provides that except where otherwise expreslly provided in the body of the Code or by any other law for exercising original jurisdiction. Thus, it is the decree which is the foundation for the appeal. The scheme of the Code of Civil Procedure is to provide for a decree and judgment in every suit. The fact that the court orders joint trial of two suits in exercise of its inherent power does not mean that it dispenses with the passing of judgment and decree in the suit as required by the Civil Procedure Code. Consolidation of two suits need not

necessarily be by agreement of parties, for, if a court, after hearing parties, feels that in the interests of justice it is necessary that two or more proceedings should be tried together, it is open to it to order so to avoid repetition of the same evidence in the different cases or to avoid the possibility of conflicting decisions in those cases or for such other justifying reasons. But nevertheless the court is not absolved from the duty of passing a judgment in those cases nor drawing up decrees in those cases. May be that a common judgment is delivered by a court but it is, in essence, a judgment in each and everyone of the cases and decrees have to be drawn up in those different cases. Maybe that there is only one trial. But that, with great respect to the opposite view, does not in any way affect the rule that there

> should be separate appeals. If the consequence of a decree being left unchallenged is to render it final, such consequence will work itself out irrespective of the question whether the decree in the connected suit has been subjected to appeal. When a party has obtained the benefit of the finality of a decision in one suit if proceeding by way of appeal in a connected suit is nevertheless to continue, necessarity te party has to face the same issue twice over. We are unable to see how the rule of resjudicata is avoided under such circumstances".

Apex Court in Premier Tyres Ltd's case (supra) laid down the same position. It was held that where no appeal is filed against the decree in the connected suit, its decree would operate as resjudicata and non filing of the appeal precludes from challenging the other decree.

8. The argument of learned counsel appearing for

respondent is that as the plea of resjudicata was not taken before the first appellate court, appellant is not entitled to agitate that question in the second appeal. Though reliance was placed on the decision of a learned Single Judge of this court in **Mohammed Lebba Mythen Kannu's** case where the learned Single Judge, relying on the decision of Madras High Court in **Rangayya V. Vallabhaneni**(AIR 1941 Madras 815), Privy Council in **Raja Jagadish Chandra Deo Dhabal Det V. Gour Hari Mahato & others** (AIR 1936 PC 258), and Calcutta High Court in **Rajani Kumar Mitra and others V. Ajmaddin Bhuiy**a (AIR 1929 Calcutta 163) held that when the appellant failed to raise the plea of resjudicata before first appellate court, he cannot be permitted to raise the contention in the second appeal, the decisions of the other High Courts and the Privy Council relied on relate to failure of the party to raise plea of resjudicata in the suit and not at the appellate stage. It cannot be disputed that if a plea of resjudicata is not raised and the pleadings in the former suit not produced, the plea of resjudicata cannot be sustained. That position cannot be equated with regard to a plea of resjudicata, which is available for the non-filing of an appeal against the decree and judgment in one of the connected suits, disposed by a common judgment.

No further evidence with regard to that aspect is necessary. Therefore the failure to raise such a plea before the first appellate court will not disentitle appellant from contending before this court that first appellate court should not have decided the appeal against him, as the plea raised by appellant before the first appellate court is barred by operation of the principles of resjudicata for non-filing of the appeal against the decision in the other suit.

9. Though O.S.183 of 1986 was a suit for injunction, learned Munsiff, as per the common judgment, found that in the interest of justice, it is necessary to fix the boundaries separating the property of appellant and first respondent. Though learned counsel appearing for respondents vehemently argued that fixation of the boundary was granted due to the relief of fixation of boundary sought for in O.S.614 of 1986, it is seen from the common judgment that while answering issue No.1 in O.S.614 of 1986, and issue No.1 in O.S.183 of 1986, learned Munsiff held that “to meet the ends of justice, parties are to be prevented from encroaching into one anothers property. Therefore boundaries are to be fixed”. It is in such circumstances, learned Munsiff fixed the boundary of AFED line as the separating boundary of the property of appellant and respondent. In fact it

is the boundary of the property of the first respondent. A decree for permanent prohibitory injunction in O.S.183 of 1986 was granted on that basis. That judgment was not challenged. It is thus final. The result is that in O.S.183 of 1986, learned Munsiff has fixed the boundary separating the property of the appellant and first respondent as AFED line. So long as this boundary is not changed and a different boundary is to be fixed in O.S.614 of 1986, as has been done by first appellate court, the result is that there would be two boundaries for the properties of appellant and first respondent. When the boundary separating te property of respondent in O.S.183 of 1986 is AFED line as fixed by the learned Munsiff, which has become final by the failure of respondents to challenge the decree, as per the modified decree passed by first appellate court, the boundary line separating the property of respondent and appellant is BC line. Such inconsistent decree cannot stand. Therefore it cannot be said that finding in O.S.183 of 1986 will not operate as bar of resjudicata, in refixing the boundary in O.S.614 of 1986. Unfortunately, this aspect was omitted to be taken note of by learned District Judge, while disposing A.S.82 of 1991 and A.S.88 of 1991. In such circumstances, the judgment of learned District Judge in A.S.82 of 1991 and A.S.88 of 1991 can only be

set aside holding that A.S.82 of 1991 will not lie, respondents are precluded from challenging the finding in O.S.183 of 1986 by principles of resjudicata, for the failure to chalenge the decree in O.S.183 of 1986. S.A.382 of 1994 is allowed. The decree and judgment passed by District Judge in A.S.82 of 1991 is set aside. That appeal stands dismissed.

S.A. 385 of 1994 is filed challenging the dismissal of the appeal filed by appellant, against the refusal to grant mesne profits. No substantial question of law arises in that appeal. Hence that appeal is dismissed.

M.SASIDHARAN NAMBIAR, JUDGE

lgk/-